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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CLIFFORD JOHN GORDON II et al., Plaintiffs and Appellants, v. 28TH DISTRICT AGRICULTURAL ASSOCIATION, Defendant and Respondent.	E069632 (Super.Ct.No. CIVDS1602089) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed.

The Homampour Law Firm, Arash Homampour, Wendi O. Wagner; Your Legal Power and Herbert L. Michel, Jr., for Plaintiffs and Appellants.

Disenhouse Law and Bruce E. Disenhouse for Defendant and Respondent.

Plaintiffs and appellants Clifford John Gordon II (decedent's husband), and Dana Louise and Lyle Lee Bell (decedent's parents), appeal after the trial court granted the motion for summary judgment brought by defendant and respondent 28th District Agricultural Association dba San Bernardino County Fair (28th District), in this action arising from the accidental death of Sabrina Lavelle Gordon (decedent), a participant in an amusement attraction. On appeal, plaintiffs contend the court erred when it found decedent had signed a waiver and release to participate in the attraction, and defendant was immune from liability pursuant to Government Code section 831.7.[1] Because we find no triable issue of fact exists as to whether decedent signed the waiver and release, we conclude summary judgment was proper. We therefore affirm the judgment.

I. PROCEDURAL BACKGROUND AND FACTS

28th District, an agency in the State of California, organizes and operates the San Bernardino County Fair (the fair) and owns and operates the event location. The fair's attractions are owned and operated by independent vendors. Specific to this case, FD Event Co. LLC (FD Event) owned and operated the "Free Drop Experience" (the attraction), which involved jumping off scaffolding onto a stuntman airbag. Geoff Hinds (Hinds), the Chief Executive Officer of 28th District, was in charge of the approval process for the attraction, which he researched and approved.

[1] All further statutory references are to the Government Code unless otherwise indicated.

The attraction was constructed on May 22, 2015. Ian Allen, an FD Event employee, had previously worked the attraction as a jump master at two prior festivals. He possessed a scaffolding certificate, which allowed him to set up the scaffolding. At the prior events, the attraction was designed with a four-foot platform extended over the stuntman bag, allowing the jumper to jump onto the middle of the bag. This was a requirement of the scaffolding company that designed and constructed the scaffolding, and it was included in the attraction's original design. The same stuntman bag was used at all three events. At both prior events, the attraction was determined to be safe.

For the fair, Aspen Decker and Chris Timm, business partners in FD Event, designed the scaffolding (or tower), but omitted the platform because it "seemed to put too much stress on the front of the tower." Thus, the stuntman bag was placed in front of the scaffolding, secured by cinder blocks and one-foot metal stakes at two corners, and connected to the scaffolding with a strap at the other two corners. The bag was placed "as close to the [scaffolding] as possible but not too close that the bag would rub against [it] and possibly cause a tear." Ian Allen estimated the bag was no more than four inches from the scaffolding and was constantly checked by Decker to make sure it did not move from its initial position. Witnesses however estimated the distance between the stuntman airbag and the scaffolding to be at least three feet.

28th District possessed the power to shut down the attraction if it was unsafe; however, 28th District had no written inspection system, checklist, or documents on how to inspect the premises, attractions, or rides to make sure they were safe. It did no testing

of the attraction to see if users were exposed to a risk of harm, never questioned why there was no jumping platform, and did not ask for, nor was provided, a scaffolding permit or documentation that FD Event's employees were qualified to erect scaffolding. FD Event was cited by the California Occupational Safety and Health Administration for failing to obtain the required permit for the scaffolding "because [the] structure was more than 36 feet high." 28th District relied on FD Event's expertise, which "was provided as far as their information, their application, web site, [and] communication," to inspect and determine the safety of the attraction.

On May 28, 2015, decedent attended the fair, where she participated in the attraction. A sign was posted at the attraction's ticket booth stating: "ALL JUMPERS MUST SIGN A WAIVER. [¶] WHY DO WE REQUIRE WAIVERS? Because this CAN be dangerous if you don't jump correctly. [¶] TYPE OF INJURIES CAN HAPPEN? [*sic*] . . . Catastrophic injuries . . . can include but are not limited to permanent disabilities, spinal injuries, paralysis, and even death. . . [¶] . . . [¶] ASSUMPTION OF RISK: As a condition to participating, YOU HEREBY ASSUME RISKS OF YOUR PARTICIPATION . . . ." Valerie Timm, an employee of FD Event, was responsible for ensuring that participants signed FD Event's waiver and release, as a condition of participating in the attraction; however, on May 28, 2015, a girl named Victoria was "manning the waiver booth." Participants were not allowed to purchase a ticket for the attraction until they had read and signed the waiver and release. FD Event produced an electronic "Waiver & Release of Liability" form containing decedent's information and signature.

Prior to jumping, decedent placed her hand where indicated to confirm her acknowledgment that she understood the risks and was volunteering to jump at her own risk.[2] Despite being instructed to jump away from the scaffolding and to not grab the scaffolding during the jump, decedent, in fact, grabbed the scaffolding, which caused her to fall onto the unprotected concrete surface. One witness said: "'When she grabbed the bar, her body swung back into the metal scaffolding, and she slammed into it and then fell toward the ground feet first.'" It is unclear whether she bounced off the stuntman airbag. She died shortly thereafter of "blunt force injury of the head."

On February 11, 2016, plaintiffs brought this action against 28th District for strict products liability, negligence, statutory liability/dangerous condition of public property, and statutory liability/common carrier liability.[3] Plaintiff Gordon also brought a survivor claim. 28th District answered the complaint and cross-complained against FD Event.

On March 9, 2017, 28th District moved for summary judgment (the MSJ) on the grounds decedent "waived, discharged, and released Defendant 28th DISTRICT, the event location owner, from liability of all claims" and "expressly assumed the risk of participating in the Free Drop Experience by signing the waiver and putting her hand on the board"; decedent's parents lack standing to sue; and 28th District never owned or controlled the Free Drop Experience, is not a common carrier, "had no notice of any

[2] Other jumpers testified they did not recall seeing this sign directing them to place their hands where indicated to confirm their acknowledgment and assumption of the risks.

[3] Plaintiffs also sued the County of San Bernardino; however, they dismissed the county in June 2016.

dangerous condition of public property, and is, in any event, immune from any liability herein pursuant to . . . Sections 810, 815, 831.2, 831.7, and 835." Hearing on the MSJ was originally set for May 25, 2017; however, it was continued to October 12, 2017.

Plaintiffs filed their opposition to the MSJ on September 28, 2017, six and a half months after the MSJ was filed and after the depositions of key witnesses had been taken. These witnesses included decedent's classmates: Robyn Bell, Doreen Browne, Maria Espitia, and Hannah Hendrix. In opposition to the MSJ, plaintiffs offered their own separate statement of undisputed facts, relying on select excerpts from the depositions of key witnesses. Plaintiffs claimed, inter alia, there was no admissible evidence that decedent waived or assumed the risk of participating in the attraction, and 28th District is "liable for gross negligence for its failure to research and inspect the [attraction], in violation of industry standards." They objected to 28th District's evidence that decedent signed the waiver and release on the grounds of lack of foundation, lack of personal knowledge, hearsay, and lack of authentication. Plaintiffs offered the declaration of Brad Avrit, a civil engineer and safety expert, who opined the attraction constituted a dangerous condition at the time of the incident and was a severe departure from the manner in which it had previously been constructed and operated.[4] He added the dangerous "condition existed long enough and was so obvious that 28th District reasonably should have discovered [it] and known it was dangerous."

[4] Avrit estimated the gap between the stuntman airbag and the scaffolding to be "between 26 and 34 inches."

On October 4, 2017, 28th District filed its reply to plaintiffs' opposition to the MSJ, including a reply to plaintiffs' separate statement of undisputed material facts (reply separate statement). According to the reply separate statement, (1) there was a sign near the waiver table requiring all jumpers to sign a waiver, (2) decedent was told she had to fill out a waiver or she could not jump, (3) decedent asked an FD Event employee what kind of injuries she was waiving, and (4) one of the women in decedent's group saw decedent sign the electronic waiver. In support of the reply separate statement, 28th District referenced and relied on the deposition testimony of the key witnesses Robyn Bell, Maria Espitia, and Hannah Hendrix; however, it failed to provide an exhibit pack containing the transcripts of these depositions. Plaintiffs had relied on the same deposition testimony, but they only provided specific excerpts from the deposition transcripts in opposition to the MSJ. The depositions were taken in April 2017, one month after the MSJ was filed.

On October 16, 2017, after taking the matter under consideration, the trial court issued its order. The court noted that 28th District "implie[d] it submitted an Exhibit Pack with excerpts from the depositions of Donovan Hendrix, Hannah Hendrix, Robin Bell, and Maria Espitia . . . [, which p]laintiffs objected to . . . . Yet the Court has no Exhibit Pack submitted by Defendant on file with those depositions. Thus, none of the evidence cited in the Reply was reviewed or considered." The court overruled all of plaintiffs' objections to 28th District's evidence with the exception of one: Hinds declaration claiming, "the Free Drop Experience is a hazardous recreational activity within the meaning of . . . Section 831.7." The court ruled this to be an improper legal

conclusion. Relying solely on the evidence submitted in support of the MSJ, the court found the undisputed evidence showed a waiver and release with decedent's name and information, and decedent could not have participated in the attraction unless she had signed the waiver and release. The court granted the MSJ on the grounds decedent signed a wavier and release, 28th District was immune from liability pursuant to section 831.7, plaintiffs' failed to establish the gross negligence exception to governmental immunity, and 28th District was not a common carrier. Notice of entry of judgment was mailed on October 25, 2017.

II. DISCUSSION

Plaintiffs contend the trial court erred in granting summary judgment because there are triable issues of (1) whether decedent signed or read the waiver and release, (2) 28th District's liability for the dangerous condition on its property; (3) 28th District's gross negligence, (4) decedent's assumption of the risk of participating in the attraction, (5) whether 28th District increased the risk involved in the attraction, and (6) decedent's comparative negligence. Plaintiffs further allege the trial court made no ruling on the parents' standing. Because we conclude summary judgment was properly granted based on decedent's execution of the waiver and release prior to participating in the attraction and the absence of gross negligence on the part of 28 District, we need not reach the merits of the remaining issues.

A. Standard of Review.

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the initial burden of showing either that one or more elements of the cause of action cannot be established or that there is a complete defense. (§ 437c, subds. (o), (p)(2); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) If the initial burden is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (§ 437c, subd. (p)(2); *Saelzler*, at p. 768.)

We review a summary judgment ruling de novo. (*Saelzler*, *supra*, 25 Cal.4th at p. 768.) "We must view the evidence submitted in connection with a motion for summary judgment in a light most favorable to the party opposing the motion and resolve 'any evidentiary doubts or ambiguities in plaintiff's favor.' [Citation.] We independently determine whether the record supports the trial court's conclusions that the asserted claims fail as a matter of law, and we are not bound by the trial court's stated reasoning or rationales. [Citation.]" (*County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 467.)

B. Execution of Waiver and Release.

Plaintiffs contend 28th District failed to meet its burden of proving decedent "signed (or even read)" the waiver and release. We disagree.

1. Authentication of an electronic signature.

"Under Civil Code section 1633.7, enacted in 1999 as part of the Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq., added by Stats. 1999, ch. 428, § 1, pp. 2809-2816), an electronic signature has the same legal effect as a handwritten signature (Civ. Code, § 1633.7, subd. (a) ['A . . . signature may not be denied legal effect or enforceability solely because it is in electronic form.']). " (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843.) Any writing, including an electronically signed agreement, must be authenticated before the writing, or secondary evidence of its content, may be introduced into evidence. (Evid. Code, § 1401; *Ruiz*, at p. 843.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

Civil Code section 1633.9 addresses authentication of an electronic signature. Such authentication establishes the electronic signature is, in fact, the signature of the person the proponent claims it is. (*Ruiz*, *supra*, 232 Cal.App.4th at p. 843; Evid. Code, § 1400.) Civil Code section 1633.9, subdivision (a), states: "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in *any manner*, including a showing of the efficacy [effectiveness or value] of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." (Civ. Code, § 1633.9, subd. (a), italics added.) Under this section, 28th District therefore could

establish the act of decedent electronically signing the waiver and release by "any manner" (*ibid.*), including showing the existence of a procedure requiring a participant to electronically sign a waiver and release prior to purchasing a ticket and participating in the attraction. Civil Code section 1633.9 does not require evidence of an effective security procedure but merely states such evidence is relevant to authenticating an electronic signature.

2. Authenticity of decedent's electronic signature.

28th District urges the trial court correctly granted summary judgment against plaintiffs' claims. It contends "there was ample proper and legal evidence to support an authentication finding" as evidenced by the electronic copy of the waiver and release, the deposition testimony establishing the protocol for participating in the attraction, and the deposition testimony of decedent's classmates confirming the adherence to the protocol.

We agree 28th District was entitled to judgment as a matter of law against plaintiffs' claims. In support of its motion for summary judgment, 28th District offered the deposition testimony of FD Event employees, who described the attraction and provided the protocol required for all participants in the attraction. According to these employees, there was a sign posted at the attraction's booth informing participants of the risk of injury and the requirement that they sign a waiver. The employees further testified FD Event required each participant to sign a waiver and release, which was available and maintained electronically, to purchase a ticket. They further testified two employees worked the attraction's booth. FD Event produced the waiver and release executed by decedent who had participated in the attraction. 28th District's evidence

sufficiently authenticated decedent's signature on the waiver and release. For the most part, plaintiffs' response conceded the truth. To survive summary judgment, plaintiffs were required to point to evidence raising a triable issue, i.e., permitting an inference that decedent did not electronically sign the waiver and release.

To sustain their burden, plaintiffs referenced the deposition testimony of Robyn Bell and Maria Espitia, who did not recall seeing a sign at the attraction's booth, which stated in part, "ALL JUMPERS MUST SIGN A WAIVER." However, Espitia testified that a "woman told us that we had to sign a waiver." Bell agreed there were two people working the attraction's booth to help participants with the waivers; however, she identified one as being a male. Hannah Hendrix confirmed there was one man at the table by the waivers and two men on the scaffolding. Although plaintiffs questioned defendant's evidence that decedent was responsible for signing the waiver and release, plaintiffs failed to offer any evidence to support a finding that FD Event's protocol (participants must sign a waiver and release in order to participate in the attraction) was not followed by decedent and her classmates. Nor did plaintiffs offer any evidence the waiver and release with decedent's name was procured by fraud or some other nefarious means.

"'[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" (*Scott v. Harris* (2007) 550 U.S. 372, 380 [disregarding plaintiff's characterization of his driving while evading police where it was "utterly discredited" by police dashboard camera]; see *Aguilar v. Atlantic*

Richfield Co. (2001) 25 Cal.4th 826, 860-861 [summary judgment law in California conforms largely to that of federal law].) Having failed to produce any evidence to dispute FD Event's protocol (filling out, completing and electronically signing the waiver and release) when purchasing a ticket for the attraction, or to show it was not followed by decedent and her classmates, the most reasonable inference to draw from the evidence is decedent voluntarily signed the waiver and release in order to participate in the attraction.

We conclude, as a matter of law, plaintiffs have failed to point to evidence raising a triable issue that decedent did not execute the waiver and release.

C. Public Entity Liability, Immunity, and Gross Negligence.

Alternatively, section 831.7 precludes the imposition of liability on a public entity for hazardous recreational activities. However, plaintiffs contend this statutory immunity does not absolve 28th District from liability for conduct amounting to gross negligence. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750-751, 776-777.) Plaintiffs have failed to demonstrate gross negligence.

"Subdivision (a) of section 831.7 provides that a public entity is not liable to any person who participates in a hazardous recreational activity 'for any damage or injury to property or persons arising out of that hazardous recreational activity.' The purpose of immunity for recreational activities on public land 'is to encourage public entities to open their property for public recreational use, because "the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use."'" (*County of San Diego v. Superior Court*, *supra*, 242 Cal.App.4th at p. 468.) A hazardous recreational

activity "means a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator." (§ 831.7, subd. (b).) Hazardous recreational activity is further defined by a nonexclusive list of activities that qualify, including such activities as jumping, parachuting, paragliding, and trampolining. (§ 831.7, subd. (b)(1)-(3).) Subdivision (c) of section 831.7 provides five exceptions to hazardous recreational activity immunity. As relevant here, one of the exceptions is gross negligence by a public entity proximately causing the injury. (§ 831.7, subd. (c)(1)(E).)

"California courts require a showing of '"the want of even scant care or an extreme departure from the ordinary standard of conduct"' in order to establish gross negligence." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 (*Decker*).) Although the determination of whether conduct constitutes gross negligence ordinarily is a question of a fact (*City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 767, 781 [triable issue of fact whether evidence shows lack of care sufficient to constitute gross negligence]; *Decker*, at p. 358), where there are no facts showing """an extreme departure from the ordinary standard of conduct,""" the gross negligence exception to immunity fails. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186; see *id*. at p. 1179 [demurrer sustained without leave to amend because failure to provide prompt emergency response to a 911 call—operator put caller on hold—does not constitute gross negligence]; *DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272 [demurrer sustained without leave to amend because

public entity had no duty to guard or warn against the known dangerous condition of a fire hose swing].)

Plaintiffs argue 28th District was grossly negligent by (1) failing to "do any due diligence with respect to the [attraction]," (2) failing to discover that "Section 5.3.3 of ASTM F2374-10[5] required that [the attraction] be designed so that users were contained at all times within the confines of the bag walls," (3) failing to recognize that "what was set up was not what it agreed to have on its property (for lack of an overhanging platform) and/or that the [attraction] exposed users to a gap which posed a substantial risk of injury, even if used with due care," and (4) failing to determine whether FD Event was qualified to run the attraction and had obtained the necessary permits. We are not convinced that any of these alleged failings amount to "[a]n act of gross negligence by a public entity . . . that is the proximate cause of the injury." (§ 831.7, subd. (c)(1)(E).)

It is undisputed that 28th District's status is that of grounds owner. It did not construct, operate, or supervise the attraction, nor did it possess the knowledge or training to do so. 28th District had no documents on how to inspect the attraction to make sure it was safe, it did no testing of the attraction to see if users were exposed to a risk of harm, it never questioned why there was no jumping platform, and it did not ask for, nor was it provided with, a scaffolding permit or documentation that FD Event's employees were

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[5] ASTM International F2374-10, section 5.3.3.3 states: "Standard Practice for Design, Manufacture, Operation, and Maintenance of Inflatable Amusement Devices. [¶] . . . [¶] The outside walls shall be designed to contain users when operated in accordance with manufacturer's specified use." (See <http://assets.ngin.com/attachments/document/0052/6898/INFLATABLES_ASTM.pdf> [as of July 23, 2019].)

qualified to erect scaffolding. Instead, 28th District relied on FD Event's expertise, which "was provided as far as their information, their application, web site, [and] communication," to inspect and determine the safety of the attraction, along with videotaped news footage and photographs from earlier festivals that offered the attraction. Such reliance does not amount to """"an extreme departure from the ordinary standard of conduct."""" (*Decker*, *supra*, 209 Cal.App.3d at p. 358.) Rather, the facts suggest mere negligence based on nonfeasance. As such, a finding of gross negligence by virtue of passive negligence is not warranted. (*Decker*, at p. 359 [fire chief's refusal to allow firefighter or other bystander to attempt a surf rescue does not amount to gross negligence]; *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 629 ["Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law."].) Since the evidence does not show 28th District's actions amounted to gross negligence, the hazardous recreational activity immunity provided by section 831.7, subdivision (a), applies.

While we understand the heartbreaking nature of this case, because section 831.7 provides 28th District with complete immunity from liability, the trial court properly granted summary judgment for 28th District on plaintiffs' claims.

III. DISPOSITION

The judgment is affirmed. 28th District is awarded costs on appeal.

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McKINSTER
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.